

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**ENERJEX RESOURCES, INC.,
APPELLANT**

vs.

**JEFFERY HAUGHEY, ET AL.,
RESPONDENTS**

DOCKET NUMBER WD77228

DATE: NOVEMBER 25, 2014

Appeal from:

The Circuit Court of Jackson County, Missouri
The Honorable John M. Torrence, Judge

Appellate Judges:

Division Two: Joseph M. Ellis, P.J., Victor C. Howard, J. and Mark D. Pfeiffer, J.

Attorneys:

Arthur A. Benson, for Appellant

Charles W. German, for Respondents

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS WESTERN DISTRICT

ENERJEX RESOURCES, INC., APPELLANT

v.

JEFFERY HAUGHEY, ET AL., RESPONDENTS

WD77228

Jackson County, Missouri

Before Division Two Judges: Joseph M. Ellis, P.J., Victor C. Howard, J. and Mark D. Pfeiffer, J.

In 2007, Appellant EnerJex Resources, Inc. decided to attempt its first public stock offering on the American Stock Exchange. Appellant intended to offer five million new shares of common stock at \$5 per share. Thus, Appellant hoped to raise \$25 million in equity from the public offering. A California investment banking firm agreed to underwrite the \$25 million public offering and provided Appellant with a timeline projecting the public offering to occur in June 2008.

Appellant subsequently sought Respondents Jeffery Haughey and Husch Blackwell, L.L.P., to provide legal services with respect to the public offering. During their initial meeting, Appellant discussed the projected timeline with Respondents. Respondents agreed to provide Appellant with legal services, but their agreement made no mention of the projected timeline. Respondents provided Appellant legal services, but the public offering did not occur until September 2008. By that time, the oil market had crashed, and Appellant's public offering failed.

In 2012, Appellant filed suit against Respondents alleging legal malpractice, breach of contract, breach of fiduciary duty, and fraud. Appellant's expert, Charles Brettell, calculated Appellant's alleged consequential damages based on a "market cap" theory, which Appellant describes as "the lost market value . . . of the company flowing from the failed securities offering." Brettell's calculation ultimately valued Appellant's "market cap" or "enterprise value" between \$202,339,588 and \$358,421,781.

In 2013, Respondents filed a motion for partial summary judgment on Appellant's damages theory. In their motion, Respondents asserted that Appellant could not recover any consequential damages because Appellant's expert calculated the damages as to Appellant's shareholders, not to Appellant as a corporation. Respondents further averred that Appellant's damages calculation is inherently speculative in that it assumes lost profits when Appellant, as a company, has no history of prior profitability.

On October 3, 2013, the trial court entered partial summary judgment in favor of Respondents. In its judgment, the trial court determined that “it is undisputed that [Appellant] was never profitable prior to the 2008 proposed stock offering and therefore cannot recover lost profits because the projection is inherently speculative.” The trial court further determined that Brettell “quantified the alleged damages of [Appellant] based on the projected value of shares of stock held by EnerJex stockholders who are not parties to this case.”

The parties subsequently reached a partial settlement regarding Appellant’s fraud, fee disgorgement, and punitive damages claims. Respondents then requested the trial court grant summary judgment in their favor on Appellant’s remaining claims of legal malpractice, breach of contract, and breach of fiduciary duty because, based upon the trial court’s previous rulings, Appellant could not establish damages. On January 6, 2014, the trial court entered its final judgment in which it granted summary judgment in favor of Respondents “based on the absence of any recoverable actual damages.”

Appellant now appeals from the trial court’s grant of summary judgment.

AFFIRMED

Division Two holds:

(1) Appellant’s declaration of a special stock dividend to its pre-merger shareholders based on the amount recovered from this litigation did not constitute an assignment of Appellant’s legal malpractice claim against Respondents. For assignment to occur, the assignor must be divested of all interest in the thing assigned. Appellant’s declaration of the special dividend did not divest Appellant of its interest in this case given that all damages awarded to Appellant would remain with the corporation and, based on the definition of “Net Recovery” used in the merger agreement, not all the damages recovered would be converted into stock shares. Therefore, no assignment occurred, and Respondents’ motion to dismiss must be denied.

(2) The trial court did not err in granting Respondents’ motion for summary judgment in that Brettell’s damages calculations are inherently speculative in that Brettell’s damages calculations include a lost profits component despite the fact that, under Missouri law, lost profits cannot be recovered without proof of a history of profitability and Appellant was never profitable prior to the 2008 public stock offering.

(3) The specific transaction exception to the requirement of proof of prior profitability does not apply in this case because, although Appellant avers that the “lost proceeds” in its damages calculation are tied to the specific transaction of the public stock offering, Brettell’s damages model includes lost profits resulting from transactions far removed from it. While Brettell’s calculations begin with the \$25 million it allegedly would have realized from the public stock offering, his calculations then assume profits from a series of expansion, acquisitions, and bank loans over a two-year period. Without any

evidence of a prior history of profitability of engaging in similar business dealings, Brettell's assumed lost profit figures are inherently speculative.

(4) Appellant cannot rely upon the specific transaction standard or exception to claim \$25 million in lost profits from the failed public offering because, although this case involves a breach of contract claim, the contract is one for legal services, not a known commodity with demonstrable market price. Thus, Appellant is not seeking lost profits on the contract itself; instead, it is seeking the \$25 million it believed it would have realized in stock sale proceeds as the injury to its business after Respondents' alleged malpractice and breach of fiduciary duties. Under such circumstances, proof of prior profitability is necessary as Appellant is not seeking lost profits directly flowing from a breach of or interference with a specific contract.

Opinion by Joseph M. Ellis, Judge

Date: November 25, 2014

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